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Supreme Court of the United States

OCTOBER TERM, 1969

No. 260

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JOHN F. DAVIS, C

GULF OIL CORPORATION, HUMBLE OIL & REFINING COMPANY, MOBIL OIL CORPORATION and SINCLAIR REFINING COMPANY,

Petitioners,

—against—

UNITED STATES OF AMERICA,

Respondent,

and

THE AMERICAN OIL COMPANY, THE ATLANTIC REFINING COMPANY, CITIES SERVICE OIL COMPANY and CITIES SERVICE COMPANY,

Respondent-Defendants.

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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The Government's brief ignores the primary reason for review before trial—petitioners' constitutional right will be irretrievably lost otherwise.[1]

The Double Jeopardy Clause of the Fifth Amendment provides: "No person shall . . . be twice put in jeopardy. . . ." If there is no review before trial, and at trial petitioners are found innocent, there will of course be no appeal on the question of whether petitioners should have been tried. If

[1]Upon review, petitioners intend to argue that the District Court erred in the test it applied, that application of the proper test would have resulted in the granting of petitioners' motion, and that even under the test applied by the District Court its conclusion was erroneous.

petitioners are convicted at a trial, they most certainly would appeal on the ground of double jeopardy. But while a conviction could be reversed, petitioners' right not to be tried would be moot and therefore lost.

The fact that a specific constitutional right may be lost without review led this Court in *Stack* v. *Boyle*, 342 U. S. 1 (1951), to hold that an order denying a motion to reduce bail was a "final decision" under § 1291. The Eighth Amendment provides: "Excessive bail shall not be required. . . ." If review of the question of whether the bail was excessive had been deferred until after judgment, the right would have been lost. Similarly, if review of a claim of right under the Double Jeopardy Clause is deferred until after final judgment, it too will be lost.

The Government argues that the need to insure prompt disposition of criminal cases justifies deferral of review of petitioners' rights. Speed in disposing of criminal cases is a factor to be considered, but not the controlling factor where questions of clear constitutional right are involved. Justice requires that speed be sacrificed under such circumstances. The rights of the parties must be given paramount consideration where such rights will otherwise be lost.

Petitioners have cited a number of cases for the proposition that a "final decision" has been construed to permit appeal before final judgment when an important claim of right which is separable from the main issue would otherwise be denied review. The Government contends that such cases, except *Stack* v. *Boyle*, are civil and should be ignored. This Court, however, has treated the above proposition as having general application. In permitting review in *Stack* v. *Boyle*, the Court relied (342 U. S. at 6) on *Cohen* v. *Beneficial Industrial Loan Corp.*, a civil case, and in *Cohen* the Court relied (337 U. S. at 546) on *Cobbledick* v. *United States*, a criminal case. Here, furthermore, the Court is dealing with a criminal case involving clear constitutional rights. In such a case, appeal before final judgment is even more necessary than in a civil case.

The Government further contends (Gov't Br., p. 6) that the issue of whether the prior trial of petitioners creates a bar is not a collateral issue because the trial of this case could not go forward until appeal of that issue is resolved. But in each of the cases cited by petitioners (Pet. pp. 7-8), trial could not proceed until the issue on which appeal was permitted had been resolved[2]. Whether an issue is collateral is not determined by whether an appeal of a decision on the issue would halt further proceedings. An issue is collateral when it is not a step toward final judgment on the merits, *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, 546 (1949), or "fairly severable from the context of a larger litigious process." *Swift & Co. Packers* v. *Compania Colombiana Del Caribe, S. A.*, 339 U. S. 684, 689 (1950).

The 1910 case of *Heike* v. *United States*, 217 U. S. 423, cited by the Government, construed (at 429) "final decision" to mean a decision that terminates the litigation on the merits leaving nothing to be done but to enforce the judgment by execution. That rigid construction has been greatly broadened by the many decisions which are cited in the Petition (at pp. 7-8) and which permit appeal before final judgment. Thus, the dictum to which the Government refers in *Heike* cannot be considered as authority.

The Government fears that the wheels of criminal justice would grind to a halt if questions of right under the Double Jeopardy Clause are permitted review before trial instead of after trial, when moot. That is not so. The Double Jeopardy Clause rarely is invoked. Baseless claims designed solely for delay can be dismissed as frivolous appeals. When necessary, meritorious appeals can be expedited under Rule 2 of the Federal Rules of Appellate Procedure. The granting of the instant petition need permit re-

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[2]Here, the question of double jeopardy was raised at the earliest possible moment and with the concurrence of the trial Judge. If the Government's motion to dismiss had not intervened, the appeal might have been disposed of on the merits with no effect on the then contemplated trial date.

view before judgment only of that very small group of decisions which determine claims of substance under the Double Jeopardy Clause. For these few cases, the interests of justice require a slight delay, if one is necessary, to preserve the constitutional rights of an accused.

CONCLUSION

For the reasons stated above and in the Petition, certiorari should be granted.

Respectfully submitted,

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